

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

74-2496

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

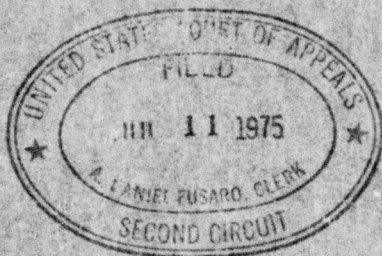
Petitioner,

—v.—

J. W. MAYS, INC.,

Respondent.

**PETITION FOR REHEARING OF RESPONDENT,
J. W. MAYS, INC.**



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—v.—

J. W. MAYS, INC.,

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RESPONDENT'S PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

J. W. Mays, Inc., respondent, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows the following:

Introduction

The presiding panel consisted of Circuit Judges Feinberg and Van Graafeiland, and District Judge Ward (by designation). The opinion and decision were filed June 30, 1975, and the judgment was also entered on that date.

This petition does not purport to challenge the disposition by this Court of the factual grounding of our claims of erroneous credibility findings, lack of substantial evidence, and actual misreading of testimony set out in the record, nor of its treatment of the failure below to draw adverse inferences predicated on the failure of General Counsel to corroborate where corroborators were available, and his failure to call important, even crucial, witnesses he actually subpoenaed. It may be theorized that there is herein one exception to the foregoing but, apart therefrom, this petition is exclusively concerned with what

may be referred to as the legal aspects of the Court's disposition. This must be delineated at the outset, since the Court's opinion is articulated, essentially, as if nothing more than a dispute over substantial evidence were involved. With deference, this is plainly not the case.

Because of the parameters we have set, this petition does not ask for a rehearing as to the Brandt 8(a)(1), the Cannon 8(a)(1), and the Lynch 8(a)(1).

I.

The first Gribbins 8(a)(1) is sustainable only on the basis of the application of the "small plant" doctrine (A26; see footnotes 33 and 34)*, since that is the only basis articulated anywhere for the finding that Hord's denial of the subject conversation with Gribbins was not to be credited. As just noted, we put aside, *inter alia*, Gribbins' character, as revealed by the Board's opinion (reversing the ALJ's conclusions as to Gribbins' discharge and alleged surveillance), which rather plainly suggests she may well have been a thief, and concocted her story to cover up her actions (A51-A52). We put aside General Counsel's failure to call Warwel, Gribbins' co-worker, a crucial witness to Hord's denial, notwithstanding General Counsel subpoenaed him. We disregard all such elements. Our position is that, as a matter of law, the small plant doctrine may not be applied to a store with some 650 employees, three huge selling floors, 72 different departments, and serving 8,000 customers a day, this while Hord was head of a department as removed as possible from the small one being organized. Since this doctrine is not applicable in the premises, the basis for the 8(a)(1) and, therefore, the 8(a)(1) itself, crumble.

* "A", followed by a number, refers to the designated page in the Appendix.

II.

The Court sustained the second Gribbins 8(a)(1), also on the basis that it is supported by substantial evidence. The Court has apparently misconceived our position.

The Board has ruled Gribbins' actual transfer was proper (A53-A54). How, then, can Hord's telling her, prior to her transfer, that she was going to be transferred—with or without a concomitant offer of higher rank—constitute an unfair labor practice? We are not—certainly not here—quarreling over evidence. We are saying that the Board's position is devoid of logic and rationality. Nor is the validity of our position diminished by the fact that the ALJ had held this transfer business was concocted to deter her from an activist role which the Board subsequently specifically found non-existent (A54). Upholding the Board's view of this 8(a)(1) on the basis of the existence of substantial evidence to support it appears to us, then, to be an error of law, inasmuch as there was simply no evidence-weighting function for this Court (or the Board) to perform, under the circumstances. We pray this Court not to equate impossible Board rationale with Board "expertise".

III.

The Brandt 8(a)(3) was premised, in major part, on Mays' alleged failure to meet its burden to show it was "motivated by legitimate objectives" in terminating Brandt. The ALJ cited *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), in support (A12), with the Board's apparent approval. While this Court merely held this unfair labor practice finding to be supported by substantial evidence, it is an entirely reasonable inference that, by not commenting on the foregoing, it adopted the view below that the case was correctly utilized. We submit this is

legally erroneous. We are aware of no case in which the cited decision was held applicable except where, to put it tersely, unions or their supporters were specifically denied rights or benefits granted others not in such categories or, conversely, where those not supporting unions were specifically granted rights or benefits denied union supporters. *Great Dane's* burden assignment rests on this sort of deliberate, disparate juxtaposition. Thus, we are here not dealing with the weight of evidence. We are dealing with the ground rules for determining how to weigh—a purely legal matter, erroneously decided, we submit, because of the misapplication of a Supreme Court opinion. It is, to us, regrettable that the Court did not see fit to comment on the ALJ's reliance on that case to support his assignment of burdens, on which rests so much of the decision below vis-a-vis this unfair. We believe it is in order for the Court to, at the very least, remand this portion of the proceedings to the Board to reconsider the applicability of the *Great Dane* case and its role in the Brandt 8(a)(3).

IV.

The Brandt 8(a)(4) is the one possible "evidentiary" exception noted in our introductory comments. The Court seems to have adopted the ALJ's (and Board's) view here that a victim of an 8(a)(3) discharge, so long as he previously testified at a Board proceeding, may be "inferred" to be, by virtue of that fact alone, the victim of an 8(a)(4) discharge (A13-A14). However, the cases we cited, in our main brief, including *Mueller Brass Co.*, 208 NLRB No. 76, make clear that some operative proof must exist connecting the testimony to the discharge. In the instant case, there is not an iota, not a scintilla, of proof connecting Brandt's discharge with his giving testimony in the first R-case. Thus, the inference may not be drawn (*Bon-R Reproductions, Inc. v. N.L.R.B.*, 2 Cir., 309 F.2d 898, 905-906).

The ALJ and the Board majority cited no cases whatever in support of their ruling. Member Kennedy, dissent-

ing on this point, cited the *Mueller* case (A55; enforcement was denied, *N.L.R.B. v. Mueller Brass Co.*, 5 Cir., 509 F.2d 704 (adv.)). Here, the General Counsel, without even mentioning, much less discussing, this dissent or the citation in support thereof, cited only *N.L.R.B. v. Scrivener*, 405 U.S. 117, in support of the 8(a)(4). (No one—except us—seems to have ascribed any significance to the fact that not only Brandt, but also, Gambino, a union supporter, and Cannon, the original union organizer, testified along with Brandt, and nothing happened to them.) The evidence, in *Scrivener*, showed that, apart from discharging and then rehiring, then again discharging, union authorization card-signers, while retaining two recently hired employees and one old one (these three had not signed such cards), the employer inquired as to who met, and were interviewed by, the field examiner from the Board's regional office (investigating the claimed illegal discharges). He then dismissed all of the four who had done so, with the excuse he had no work for them. Nevertheless, he still retained the two new men, and the sole non-signer out of the six old employees. There was thus no question as to the substantiality of the evidence as to the (actually charged) retaliation for giving the affidavits. Accordingly, apart from a brief discussion of some incidental, not presently germane jurisdictional question, the case concerned itself solely with a purely legal analysis as to whether the Act, in prohibiting job retaliation for filing charges or giving testimony, was to be read literally, or more broadly so as to encompass affidavits given in the investigative stage. The *Scrivener* case is, therefore, totally inapplicable.

What this Court seems to have held, then, is that the Board, departing from its own precedents, may find an 8(a)(4) violation by inference alone, predicated on the mere basis that an 8(a)(3) dischargee had previously testified. This is deemed by this Court to constitute substantial evidence, notwithstanding, we must repeat, this inference is drawn even though other union supporters also testified albeit without any adverse effects upon them, that the union

filed no 8(a)(4) charge at all, and that, to employ this Court's own terminology, the 8(a)(4) was treated "almost in passing", taking up one sentence out of the 48 printed pages constituting the ALJ's decision (A13-A14). Here, too, we pray this Court not to equate Board inconsistency with case-tailored Board expertise.

V.

The Murphy 8(a)(1) found below, and sustained on substantial evidence grounds by this Court, amounts, in our judgment, to an abandonment, if not a reversal, of this Court's own holding in *Bourne v. N.L.R.B.*, 332 F.2d 47. (Not only was this not charged, not only was it not set out in the bill of particulars, but also, Murphy never testified to it, nor was it even prosecuted, for all practical purposes, by the General Counsel). A simple question was asked of Murphy by so low level a supervisor, the latter himself was sought to be organized. The answer was truthful, there were no coercive aspects to the question, only one question was put (as to whether Brandt was soliciting, based on his unauthorized conversation, on a selling floor, with Murphy, while both were supposed to be on working time, this after Brandt's two previous organizing attempts that very day). As regards Murphy, the incident was closed with his "yes" answer, for all purposes. Not only, then, is the finding of an unfair, in these circumstances, wholly contrary to this Court's *Bourne* decision, but also, it amounts to a pro tanto abandonment or reversal of this Court's pronouncement in *Bon-R Reproductions, Inc. v. N.L.R.B.*, *supra*, 309 F.2d 898, 903-904, where it said:

"A substantial inroad will be made on the right to express one's views * * *, if under pain of Board proceedings * * * an employer (or employee) must control his every word or refrain from speaking altogether."

In *Bon-R*, the Court articulated this in connection with an employer's telling his employees and the union represen-

tative that they would have no union unless he wanted one—infinitely more coercive than one lone question put by so low level a supervisor trying to ascertain the reason behind a work interruption. Even so, an unfair was sustained, in *Bon-R*, expressly only because the employer's statement was made three times in two days. On the other hand, in that very case, actual interrogation as to union sympathies was found legal there under the Blue Flash doctrine (*Blue Flash Express, Inc.*, 109 NLRB 591, 592).

It is respectfully submitted that the Court's holding here simply cannot be squared, in the premises, with the *Bourne* or *Bon-R* cases. No question exists as to the power of this Court to abandon or reverse its former rulings but, surely, this Court would have so stated had this been its intention. We are impelled to conclude, then, the Court intended no such departure and that its upholding of this miniscule incident as constituting an 8(a)(1) amounts to legal error. As implied in *Bon-R*, it becomes difficult, indeed, to operate a business if such an incident can be blown up into an unfair labor practice. Far too much is being hung on a "slim peg" (*Bon-R Reproductions, Inc. v. N.L.R.B.*, *supra*, at p. 907).

VII.

As regards the Coletto 8(a)(1), it will be recalled we amplified our brief by letter dated June 11, 1975. Unhappily, there is an error in the letter's citation of *Mt. Ida Footwear Company*, which should have been cited as 89 LRRM 1169 (its official citation is 217 NLRB No. 165, and it is also cited at 1974-75 CCH NLRB ¶15,748).

The Coletto 8(a)(1), of course, was also sustained on the grounds that it was supported by substantial evidence. We can only surmise that we did not sufficiently convey our point. Even if the facts were as General Counsel would have them, DeRonde's statement that he could be in trouble for signing a card nowhere approaches in intensity what was held proper in *Mt. Ida*. There, the president of the company told all his employees signing union organizational cards could be "fatal". The Board held that not to be an

unfair labor practice. In *Ohmite*, 217 NLRB No. 80, the Board held that a letter circulated to all employees containing reference to the company's viewing the organization campaign with "serious concern" and saying that unionization could result in "serious harm" did not constitute an unfair labor practice.

It is our view, then, that the substantial evidence found by this Court to sustain the Colletto unfair could at most be utilized to sustain the Board's fact finding which we had contested. What has been missed, in our respectful opinion, is that, even so, no unfair labor practice can be found. And, equally applicable here, as before, is our suggestion as to Board inconsistency.

VIII.

As regards the broad order, the opinion contains a most extraordinary statement, to wit, we argue that the broad order is unwarranted "almost in passing". In support, the per curiam drops a footnote, noting that we have devoted "only two pages of a 65 page brief" to that problem. With respect, we cannot, and do not, accept what the use of this phraseology in the opinion appears to imply, that is to say, the validity of our point is, in some undefined manner and ratio, reduced by virtue of the small amount of space devoted to it, this in the face of very strict rules as to brevity contained in the Federal Rules of Appellate Procedure (Rule 28g), and this Court's own Rules supplemental thereto (Rule 27f).

We do, however, suggest that a parallel comment would be perfectly in order with regard to the fact that this whole case was started by a few 8(a)(3) charges by union counsel, coincident, however, not with the first, but with the second election petition. When that petition, too, was lost (as a matter of law—alleged "unfair" had nothing to do with it), all interest was lost. Neither counsel for the Operating Engineers nor for the Service Employees appeared at the hearing. The first day saw only Lunger, the business repre-

sentative of the Operating Engineers, who testified for a few minutes and then left. All of this lends credence to our view that the original charges—out of a total of seven charged 8(a)(3)s, only one is left; again, the various 8(a)(1)s here and 8(a)(4)s were not even mentioned therein—were filed as a perfunctory assist to the organizing campaign. It is in order to suggest that the “in passing” comment could have been utilized, with much greater validity, to defeat the broad order rather than to support it.

We also proffer the view that footnote 2 of the Court’s opinion, referring to the dismissals of all the alleged 8(a)(3)’s, save for Brandt, similarly tends to defeat the validity of the broad order. Out of some 30 people claimed for a unit (Ex. 2c), out of some 27 named targets, one, just one, is found to have been discriminatorily discharged. Such a factor should have been utilized, we suggest, to demonstrate a lack of animus, or of intense hostility, on the part of respondent. Instead, the factor is utilized to delineate that the ALJ and Board did not accept the charges uncritically. We submit that critical appraisal by the Board is what all of us have a right to expect. More importantly, the fact that all but one of the 8(a)(3) charges have been dismissed, apart from not constituting support for a broad order, also does not constitute support, as the footnote seems to imply, for the unfairs actually found. If the dismissals are not totally irrelevant in appraising the validity of the unfairs found, their relevance does not extend further, actually, than to cast doubt on those findings.

Finally, we point out that, while the Board is presumed to know its own decisions, the old Mays case, 356 F.2d 693, was not cited by the Board anywhere. We brought it out, not the Board, which fact implies that the Board itself did not consider so old a case to have a present day impact on the disposition of this case. Surprisingly, this Court went the Board one better. Instead of abjuring the disparity in treatment the old case delineated, the Court

opted to join that one and this one together, as it were, to bolster the unwarranted broad order here.

The cases are quite uniform. The Board itself has limited its backward reaching to support a present broad order to "recent" cases (e.g., *Teamsters, Local 810*, 200 NLRB No. 81; *Teamsters, Local 71*, 130 NLRB 1007, 1009; see, also, *N.L.R.B. v. I.B.T., Local 135*, 267 F.2d 870, 874, three other cases within "recent past"). The *Local 810* case, for example, involved violence, including physical threats, harassment, and vandalism, as well as secondary boycotts. The Board refused a broad order, despite the ALJ's recommendations, noting that his inclusion of the union's past record (the most recent previous unfair took place 15 years prior, but there were some before that—not so here) involved too much of a lapse of time for it to bear on the present remedial order. Accordingly, reference to "any other employer" was stricken from the proposed order. If a broad order was denied in that case, it is, we submit, an inconsistency for one to be ordered here. At the very least, this Court should, in the circumstances, remove all reference in the required notice to "any other labor organization". Here, too, the Board's inconsistency ought not be honored under the guise of its "expertise".

Respectfully Submitted,

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I, SEYMOUR W. MILLER, of counsel to Respondent, J. W. Mays, Inc., do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purpose of delay.

Seymour W. Miller

SEYMOUR W. MILLER